

**Letter of Findings Number: 06-0488
Food and Beverage Tax
For the Tax Years 2003-2005**

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ISSUES

I. Sales and Use Tax – Imposition on Service Charges.

Authority: [IC 6-8.1-5-1\(c\)](#); IC § 6-2.5-2-1; IC § 6-2.5-4-1(b); IC § 6-2.5-1-5(a)(3); IC § 6-2.5-4-1(g); *Indiana Dep't of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

The Taxpayer protests the imposition of sales tax on service charges.

II. Sales and Use Tax – Exemption Certificates.

Authority: IC § 6-2.5-8-8; [45 IAC 2.2-8-12](#).

The Taxpayer protests the imposition of food and beverage tax on the rental of hotel rooms to persons with exemption certificates.

III. Sales and Use Tax – Imposition on Table Games.

Authority: [IC 6-8.1-5-1\(c\)](#); IC § 6-2.5-2-1.

The Taxpayer protests the imposition of sales tax on certain table games.

IV. Sales and Use Tax – Imposition on Installation Charge.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-1-5(b)(6).

The Taxpayer protests the imposition of sales and use tax on an installation charge.

V. Sales and Use Tax – Imposition on Freight Charge.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-1-5(a)(4).

The Taxpayer protests the imposition of use tax on freight charges.

VI. Sales and Use Tax – Out of State Mailings.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-1-5(a)(4).

The Taxpayer requests a refund of sales taxes paid on out of state mailings.

VII. Tax Administration - Ten Percent Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)\(c\)](#).

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The Taxpayer is a corporation that provides gaming, restaurants, and sleeping accommodations. After an audit, the Indiana Department of Revenue (Department) assessed additional sales and use tax, interest, and penalty. The Taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

I. Sales and Use Tax – Imposition on Service Charges.

DISCUSSION

The Taxpayer served prepared meals and beverages in its restaurant's banquet facilities. The invoices for the banquets have a separate eighteen percent charge for "service." The Department assessed sales tax on the service charge. The Taxpayer protested the assessment contending that the service charge was exempt from the sales tax.

All assessments by the Department are presumed to be valid. IC § 6-8.1-5-1(c). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.* Exemption statutes are to be strictly construed against the Taxpayer. *Indiana Dep't of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

IC § 6-2.5-2-1 imposes the sales tax on Indiana retail transactions. A retail transaction takes place when a seller in its regular course of business transfers tangible personal property to a purchaser for consideration. IC § 6-2.5-4-1(b). The provision of services is not subject to the sales tax unless there is a specific statutory provision imposing sales tax on the provision of the service. IC § 6-2.5-1-5(a)(3) imposes the sales tax on, "any services necessary to complete the sale, other than delivery and installation charges[.]"

An exemption from the sales tax is granted at IC § 6-2.5-4-1(g) as follows:

Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

The service charge on the invoice for food and beverages at the Taxpayer's banquet facility covered the delivery of the food and beverages to the patrons by the wait staff. The Taxpayer accounted for the service charges separately from the charges for the food and beverages. The money received from the service charges

was used to pay the wait staff for serving the food and beverages at the particular event. There is no indication that the service charge was for anything but the wait staff's labor of serving and delivering the prepared food and beverages to the patrons of the banquet facility. Separately stated charges for the delivery and service of prepared food and beverages for consumption at the time of delivery in the Taxpayer's facility are exempt from the sales tax.

FINDING

The Taxpayer's protest is sustained.

II. Sales and Use Tax – Exemption Certificates.

DISCUSSION

The Taxpayer rents hotel rooms. The Taxpayer did not collect and remit sales tax on rooms where the patrons presented sales tax exemption certificates. The Department assessed sales tax on the room rentals for which the Taxpayer had an exemption certificate. The Taxpayer protested the assessment.

IC § 6-2.5-8-8 provides for exemption certificates from sales tax in pertinent part as follows:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

[45 IAC 2.2-8-12](#) clarifies the law concerning exemption certificates in pertinent part as follows:

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof...

Pursuant to the statute and explanatory regulation, the production of a valid exemption certificate exempts the merchant from the duty of collecting and remitting sales tax on that transaction. Without a valid exemption certificate, the burden shifts back to the merchant to prove that the sales were not actually subject to sales tax. The taxpayer provided valid exemption certificates for many of the room rentals on which the Department assessed sales tax. The Taxpayer had no duty to collect and remit sales tax on those room rentals for which the Taxpayer supplied valid exemption certificates. For those rentals without valid exemption certificates, sales tax should have been collected and remitted to the Department.

FINDING

The Taxpayer's protest is sustained in part and denied in part.

III. Sales and Use Tax – Imposition on Table Games.

DISCUSSION

The Department assessed use tax on monthly payments for certain table games pursuant to IC § 6-2.5-3-2. The Taxpayer protested the assessment. The Taxpayer argued that it owned the tangible personal property used in playing the games. All the payments were for intangible licensing fees which would be exempt from the sales and use tax.

The Taxpayer bears the burden of proving that the Department improperly assessed the use tax. IC § 6-8.1-5-1(c). Although given ample opportunity to do so, the Taxpayer failed to supply any documentation substantiating its contention that it owned the tangible personal property and made monthly payments for the license to use the table games. The Taxpayer failed to sustain its burden of proving that the fees paid for table games were exempt from the sales and use tax.

FINDING

The Taxpayer's protest is denied.

IV. Sales and Use Tax – Imposition on Installation Charge.

DISCUSSION

The Taxpayer purchased gift shop display cases in April, 2005. The Department assessed sales tax on the installation charge for gift shop display cases pursuant to IC § 6-2.5-2-1. The Taxpayer protested this assessment.

IC § 6-2.5-2-5(b)(6) excludes from the sales tax, "installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser." The invoice for the gift shop display cases stated the installation charges separately from the charges for materials and labor. The installation charges were exempt from the sales and use tax.

FINDING

The Taxpayer's protest is sustained.

V. Sales and Use Tax – Imposition on Freight Charges.

DISCUSSION

During 2003 the Taxpayer paid delivery charges related to the purchase of slot machines. The Department assessed sales tax on these charges. The Taxpayer protested the assessment.

Indiana imposes a sales tax on the sale of tangible personal property by a retail merchant in its regular

course of business. IC § 6-2.5-2-1. Services are not subject to the sales tax unless there is a specific statutory imposition on a particular service. Effective January 1, 2004, delivery charges became subject to the Indiana sales and use tax. IC § 6-2.5-1-5(a)(4).

Prior to January 1, 2004 the sales and use tax was not imposed on separately stated delivery charges. Therefore, the Department incorrectly imposed tax on the delivery charges for slot machines purchased and delivered in 2003.

FINDING

The Taxpayer's protest is sustained.

VI. Sales and Use Tax – Out of State Mailings.

DISCUSSION

The Taxpayer paid printers to prepare and deliver mailings. These mailings went to residents of Indiana and other states. The Taxpayer produced invoices to indicate that it paid sales tax on the mailings. The Taxpayer claims a refund of the sales taxes paid on mailings delivered to residents of other states.

An exemption from the sales tax is provided at IC § 6-2.5-5-24 as follows:

(a) Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

(2) derived from commercial printing that results in printed materials, excluding the business of photocopying, that are shipped, mailed, or delivered outside Indiana.

The Taxpayer contends that fifty five percent of the mailings were sent directly to residents of other states. The Taxpayer did not, however, provide any documentation to substantiate this assertion. The Taxpayer was given the opportunity to submit verifiable documentation of its formula for determining the percentage of mailings exempt from sales tax. Although it is reasonable to assume that some of the mailings were sent to residents of other states, the Department needs verifiable documentation of the specific percentage of exempt mailings to grant a claim for refund of sales taxes paid.

FINDING

The Taxpayer's claim for a refund of sales taxes paid is respectfully denied.

VII. Tax Administration - Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed tax was due to reasonable cause rather than negligence.

FINDING

The Taxpayer's protest to the imposition of the penalty is sustained.

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